JAN 4 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945. No. 718 .

LEHIGH NAVIGATION COAL CO., INC.; THE LEHIGH VALLEY COAL COMPANY, INC.; WINTON COAL MINING CO., INC.; ST. CLAIR COAL CO.; PEACH MOUNTAIN COAL MINING CO.; FRACKVILLE COAL CO., INC.; BELL COLLIERY COMPANY; POTTSVILLE COAL COMPANY; PRIMROSE COAL COMPANY; MARY D. COAL MINING COMPANY; JONES COAL CORPORATION; HADDOCK MINING COMPANY; OTTO COLLIERIES COMPANY; REPPLIER COAL COMPANY; GLEN ALDEN COAL COMPANY; AND MOREA-NEW BOSTON BREAKER CORP.

Petitioners,

v.

JOHN B. KELLY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILLIAM A. SCHNADER,
E. RUSSELL SHOCKLEY,
ARTHUR LITTLETON,
THOMAS C. EGAN,
Counsel for Petitioners.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915. No. .

Lehigh Navigation Coal Co., Inc; The Lehigh Valley Coal Company, Inc.; Winton Coal Mining Co., Inc.; St. Clair Coal Co.; Peach Mountain Coal Mining Co.; Frackville Coal Co., Inc.; Bell Colliery Company; Pottsville Coal Company; Primrose Coal Company; Mary D. Coal Mining Company; Jones Coal Corporation; Haddock Mining Company; Otto Collieries Company; Repplier Coal Company; Glen Alden Coal Company; and Morea-New Boston Breaker Corp.,

Petitioners,

v.

John B. Kelly, Inc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Corporations organized under the laws of the Commonwealth of Pennsylvania, respectfully

pray this Court for the issuance of a Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit, to review a final judgment of that Court entered on October 4, 1945, reversing an Order of the District Court of the United States for the Eastern District of Pennsylvania, entered on March 15, 1944.

A certified transcript of the record in the case, including the proceedings in said Circuit Court of Appeals, together with the requisite additional copies thereof, is furnshed herewth, in conformity with Rule 38 of this Court.

STATEMENT OF THE MATTER INVOLVED.

The issues presented to this Court in this case arise out of the jurisdictional problem relating to the proper method of calculating the jurisdictional amount in a diversity of citizenship case.

The plaintiff is a Delaware Corporation.

The defendants are Corporations of the Commonwealth of Pennsylvania. The first paragraph of the bill of complaint alleges that "the amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000). The complaint further states that the plaintiff is engaged in the business of brick masonry construction work and owns a property having frontage on the Schuylkill River, in Philadelphia, on which there is located its alleged piers and docks. The complaint alleges that the sixteen companies named as defendants are engaged in the operation of coal mines with plants adjacent to the upper Schuylkill River or its tributary streams. It is further alleged that the defendants are discharging, and for a long time have discharged, coal dust, culm, and various other refuse materials into these waters, the result of which has been to impair the navigability of the River, to raise its bed, and to narrow its channel, thereby affecting in various ways and to

various degrees all communities, and their residents, along the River. In the case of the plaintiff it is averred that these deposits on the bed of the River adjacent to plaintiff's property prevent plaintiff from obtaining building materials by way of the River. As a further result, it is alleged that any abnormal increase in the level of its waters causes it to overflow its banks and to do damage to plaintiff's property and to disrupt plaintiff's business. The complaint sets forth that such damage is brought about by the "united and combined acts" of the defendants in thus discharging the waste materials, and that such materials and deposits are so "united, combined, and intermingled" within the waters of said Schuylkill River and its tributary streams as to be impossible of tracing to any individual defendant. Injunctive and other relief is stated in the complaint which has joined the sixteen coal company defendants and has aggregated plaintiff's alleged claims against each of the defendants for the purpose of showing the jurisdictional amount.

The defendants filed a joint motion to dismiss the complaint upon the ground that the District Court has no jurisdiction to hear and determine the action, contending that any liability resulting from the acts set forth in the complaint is, under the law of Pennsylvania, several and not joint, and that claims against several tort-feasors may not be aggregated to establish the requisite amount in controversy for Federal jurisdictional purposes. The defendants further contended that the primary matter in controversy is an alleged invasion of the right of the plaintiff, which it has in common with other members of the general public, to have the navigability of the Schuylkill River free from impairment by the alleged actions by the various defendants. Under the law of Pennsylvania, plaintiff has a standing to enjoin such a public nuisance only if plaintiff has suffered injury therefrom different in kind and degree from that suffered by other members of the general public coming into contact with

the nuisance. Accordingly, the test of the value of the matter in controversy must be limited to the actual damages, if any, suffered by plaintiff from the independent actions of each defendant, and such damages must be different in kind and degree from that suffered by other riparian owners and members of the general public. Defendants also contended that the complaint was destitute of any facts necessary to show that the jurisdictional amount was involved, there being nothing averred as to the value of the right alleged to be injured or the extent of the alleged injury thereto, other than a general averment of jurisdictional amount.

The District Judge accepted the contention of the defendants as the valid one under the authorities, and dismissed the complaint by an Order and Opinion filed March 15, 1944, on the ground that "Since, therefore, the action against these defendants is, under Pennsylvania law, several and not joint the complaint fails to show that the amount in controversy with respect to the claim against any single defendant exceeds the jurisdictional amount, it is insufficient to show that this Court has jurisdiction of the case."

The plaintiff appealed from this Order of the District Court dismissing its bill of complaint, and on October 4, 1945, the United States Circuit Court of Appeals for the Third Circuit reversed the Order of the District Court aforesaid on the ground that in an action of this nature the money damage allegations of the bill are merely a collateral item, the essence of the plaintiff's suit being the injunctive protection which it seeks to invoke to prevent a continuing trespass upon its property, and that consequently the jurisdictional amount is to be calculated on the basis of the value of the property right which is being protected; however, the Court failed to pass upon the contention that the complaint was destitute of any facts necessary to show the value of the right or the extent of injury thereto. In reaching this conclusion the

Circuit Court also held that the allegations in the bill of complaint were sufficient to establish that plaintiff suffered a special kind of injury different in kind and degree from that suffered by members of the general public coming into contact with the nuisance. Similarly, the Court found that the allegations of the bill of complaint entitled the plaintiff to equitable relief or to monetary damages under the decisional and statutory law of Pennsylvania relative to the mining industry.

On October 19, 1945, your Petitioners filed a petition to stay issuance of mandate pending petition for certiorari.

THIS COURT HAS JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of The Judicial Code, as amended by the Act of February 13, 1925, C. 229, 43 Stat. 937, 28 U. S. C. A., Section 347. The Opinion and Judgment of the Circuit Court of Appeals was filed on October 4, 1945.

The jurisdiction of this Court is invoked for the purpose of determining whether the Circuit Court of Appeals erred in defining the matter in controversy in this case and applied the correct test of its value for jurisdictional purposes, having regard to the fact that the case was presented solely upon the pleadings as a result of the defendants' motion to dismiss. This Court has repeatedly taken jurisdiction of cases involving the question whether or not the jurisdictional amount was present. See McNutt, Governor of Indiana v. General Motors Acceptance Corp., 298 U. S. 178, 56 S. Ct. 780 (1936); Kvos, Inc. v. Associated Press, 299 U. S. 269, 56 S. Ct. 197 (1936); Saint Paul Mercury Indemnity Co. v. Red Cab Company, 303 U. S. 283, 58 S. Ct. 586 (1938); Gibbs, Attorney General, et al. v. Buck, 307 U. S. 66, 59 S. Ct. 725 (1939).

Specifically, your petitioners contend that the Circuit Court of Appeals erred in the following respects:

(*a*) In holding that the matter in controversy is plaintiff's right to occupy or enjoy its property and to function as a business organization. The defendants contend that the primary matter in controversy is an alleged invasion of the right of plaintiff, which it has in common with other members of the general public, to have the navigability of the Schuylkill River free from impairment by the alleged actions by the various defendants;

(*b*) In holding that the value of the above defined matter in controversy is the test for jurisdictional purposes irrespective of the extent to which such right is alleged to have been injured. Since, under the law of Pennsylvania, the plaintiff has a standing to enjoin a public nuisance only if plaintiff has suffered injury therefrom different in kind and degree from that suffered by other members of the general public, the defendants contended that the test of the value of the matter in controversy must be limited to the actual damages, if any, suffered by plaintiff from the independent actions of each defendant;

(*c*) In holding that plaintiff in its complaint has sufficiently averred a special injury different in kind and degree from that suffered by members of the general public coming into contact with the nuisance. Defendants took the position that under the appropriate Pennsylvania decisions plaintiff had pleaded special injury differing only as to degree and not in kind from that suffered by other members of the general public; therefore, there was no matter in controversy as the plaintiff had no standing to maintain the same;

(*d*) In holding that under the decisional and statutory law of Pennsylvania relative to the mining industry, the plaintiff is entitled to the equitable relief and monetary damages sought. The defendants took the position that

under Pennsylvania decisions such as THE PENNSYLVANIA COAL COMPANY v. SANDERSON, 113 Pa. 126 (1886), plaintiff would, under no circumstances, be entitled to the absolute equitable relief sought and that plaintiff is not entitled to monetary damages because it has failed to aver to what extent defendants are engaged in mining operations contrary to the decisional and statutory law of Pennsylvania;

(*e*) In failing to hold that under the decisions of this Court a bill of complaint must aver facts essential to show that the jurisdictional amount is present and that jurisdictional amount must be shown with respect to each defendant, as under the decisions of Pennsylvania the defendants are not joint tort-feasors. Defendants took the position that plaintiff's complaint was insufficient under the decisions of this Court in view of the fact that it is destitute of any averments relating to the value of the right in question or the extent of any injury thereto, the complaint merely containing a general jurisdictional statement that the matter in controversy is in excess of $3.000. In effect, the complaint, read as a whole, aggregates the alleged damages sought from the various defendants despite the fact that under the decisions of this Court the jurisdictional amount must be pleaded with respect to each defendant where they are not joint tort-feasors.

QUESTIONS PRESENTED.

Where a lower riparian owner of lands seeks equitable relief (and monetary damages) from a public nuisance (impairment of navigability of a river by deposits of mine wastes) allegedly created by sixteen upper riparian owners (who under local law would not be joint tort-feasors), and avers that it has suffered special damage—which, under the State law, must differ in kind and degree from that suffered by other riparian owners—

because of its inability to utilize its pier and docks and from the occasional flooding of its property, must the amount in controversy against each upper riparian owner be measured by the damage suffered by the lower riparian owner from such upper riparian owner?

Where a plaintiff in a civil action seeks injunctive relief and monetary damages against sixteen alleged tort-feasors, whose liability, if any, would be several and not joint, must the bill of complaint set forth facts essential to show either the value of the right involved or the extent of the injury thereto, and that the jurisdictional amount is involved as to each tort-feasor?

Must the bill of complaint be dismissed for want of jurisdictional amount where it appears to a legal certainty from the face of the bill of complaint that the equitable relief and the monetary damages praved for may not be recovered under the governing decisional and statutory State law?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The discretionary power of this Court to grant a Writ of Certiorari is invoked upon the following grounds, namely:

(*a*) The Circuit Court of Appeals in its decision states that in cases concerning injunctions against public acts, "the recent trend of the United States Supreme Court has been to narrow its construction of the jurisdictional amount in controversy", thereby implying that the principles established by this Court in such decisions are not applicable to injunction suits involving private acts, in so far as the jurisdictional amount is concerned. This is wholly unwarranted because the statute prescribing the jurisdictional amount makes no such distinction.

To say the least, the public interest requires a clarification of this uncertainty, in so far as jurisdictional amount is concerned in injunction cases.

(*b*) The Circuit Court of Appeals has decided a federal question (jurisdictional amount) in a way probably in conflict with recent applicable decisions of this Court. Under recent decisions of this Court it has been held that a plaintiff must allege in his pleadings the facts essential to show jurisdiction and that a mere general averment of the jurisdictional amount is not sufficient. McNutt, Governor of Indiana v. General Motors Acceptance Corp., 298 U. S. 178, 189 (1936). Despite the fact that the plaintiff failed to make the necessary allegations with respect to the value of the right alleged to be invaded by the defendants, the Circuit Court of Appeals reinstated the plaintiff's bill of complaint on the strength of a general averment as to jurisdictional amount.

Moreover, the Circuit Court of Appeals reinstated the plaintiff's bill of complaint on the strength of a general averment of the jurisdictional amount despite the fact that this Court in Clark, Director of Department of Motor Vehicles v. Paul Gray, Inc., et al., 306 U. S. 583 (1939), held that a general allegation of jurisdictional amount is insufficient where there are numerous parties having no joint or common interest in the subject matter of the suit.

(*c*) The position of the Circuit Court of Appeals with respect to jurisdictional amount is inconsistent with the decision of Leitch v. City of Chicago, et al. (C. C. A. 7th, 1930), 41 F. (2d) 728 [Certiorari denied, 282 U. S. 891, (1930)].

(*d*) The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable Pennsylvania decisions relating to the mining industry. Under the decisional and statutory law of Pennsylvania, if mine wastes escape into the river with injurious results, any damages resulting are *damnum*

absque injuria provided presently-known precautionary methods are taken by the defendants. The bill of complaint sustained by the Circuit Court of Appeals seeks an absolute injunction against the defendants from discharging any mine wastes whatsoever into the river and as a basis for monetary damages avers that the defendants are negligent in their efforts to prevent pollution of the river without specifying in any way the manner in which the defendants are derelict in this respect.

(*e*) The Circuit Court of Appeals has decided another important question of the law in a way probably in conflict with the applicable Pennsylvania decisions. The plaintiff in its bill of complaint pleaded a public nuisance (impairment of the navigability of the Schuylkill River) and by way of special injury averred that the culm deposits in the bed of the River prevent plaintiff from utilizing the River for obtaining building materials, and that the occasional overflow of the River resulting from storms disrupted plaintiff's business and depreciated the value of its property. Under Pennsylvania decisions, plaintiff has no standing to enjoin a public nuisance unless it can show injury different in kind and degree from that suffered by other persons coming into contact with the nuisance. The Circuit Court of Appeals held that plaintiff had pleaded the special injury required under the Pennsylvania decisions despite the fact that the alleged injury suffered by the plaintiff is merely different in degree from that suffered by other riparian owners located along the River.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this

cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of said Circuit Court of Appeals be reversed; and that your petitioners be granted such other and further relief as to this Honorable Court may seem meet.

LEHIGH NAVIGATION COAL CO., INC.; THE LEHIGH VALLEY COAL COMPANY, INC.; WINTON COAL MINING CO., INC.; ST. CLAIR COAL CO.; PEACH MOUNTAIN COAL MINING CO.; FRACKVILLE COAL CO., INC.; BELL COLLIERY COMPANY; POTTSVILLE COAL COMPANY; PRIMROSE COAL COMPANY; MARY D. COAL MINING COMPANY; JONES COAL CORPORATION; HADDOCK MINING COMPANY; OTTO COLLIERIES COMPANY; REPPLIER COAL COMPANY; GLEN ALDEN COAL COMPANY; and MOREA-NEW BOSTON BREAKER CORP., Petitioners.

By

WM. A. SCHNADER,
E. RUSSELL SHOCKLEY,
ARTHUR LITTLETON,
THOMAS C. EGAN,
Counsel for Petitioners.